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Supreme Court, U.S.
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No. 04-177

In The Supreme Court of the United States

CHRISTY McKEE and PINTER ENTERPRISES, INC., d/b/a CLUB JUANA,

Petitioners,

vs.

CITY OF CASSELBERRY, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Florida District Court Of Appeal For The Fifth District

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Casselberry's Ordinance No. 98-922, which regulates nudity in establishments that are licensed to sell or allow the consumption of alcoholic beverages, is constitutional.

PARTIES TO THE PROCEEDING

The parties listed in the caption, Christy McKee, Pinter Enterprises, Inc. d/b/a Club Juana, and the City of Casselberry, Florida, are the only parties to this proceeding.

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STATEMENT OF THE CASE

Petitioner Christy McKee (hereinafter referred to as "McKee") and former Plaintiff Margaret K. Morgan (hereinafter referred to as "Morgan" filed suit against Respondent, City of Casselberry, Florida, (hereinafter referred to as "City" or "Casselberry") for a judgment declaring that Casselberry Ordinance Number 98-922 (hereinafter referred to as "Ordinance No. 98-922" or "Casselberry Alcohol-Public Nudity Ordinance") is invalid under the Florida and/or United States Constitutions, and for an injunction permanently forbidding the enforcement of Ordinance No. 98-922. McKee and Morgan also sought the issuance of a temporary injunction to prevent the enforcement of Ordinance No. 98-922 during the pendency of the litigation. Following a hearing, McKee and Morgan's motion for temporary injunction was denied.

McKee and Morgan subsequently amended their complaint to add Michael E. Pinter as a Plaintiff, and thereafter amended their complaint once again to substitute Pinter Enterprises, Inc. d/b/a Club Juana (hereinafter referred to as "Club Juana") for Michael Pinter as one of the plaintiffs in the case. Pinter Enterprises, of which Michael Pinter is the President, owns the license which authorizes liquor to be dispensed at Club Juana.

Casselberry moved for the entry of final summary judgment or alternatively, partial summary judgment. McKee, Morgan, and Club Juana responded by filing a cross motion for summary judgment. The court entered partial summary judgment, stating "The similarities between the Casselberry Ordinance [and] the ordinance in [*City of*] *Erie* [*v. Pap's A.M.*, 529 U.S. 277 (2000)] leads to the conclusion that the Casselberry Alcohol-Public Nudity

Ordinance is content-neutral and entitled to only the 'outer ambit' of First Amendment protection." The court also ruled that the Casselberry Alcohol-Public Nudity Ordinance passes the first prong of the legal test for determining the constitutionality of statutory regulation of expressive conduct set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), because the enactment of the ordinance is within the constitutional power of the City since the City's efforts in enacting the Ordinance are to protect the public health, safety, and welfare.

Casselberry thereafter moved for summary judgment regarding the proper evidentiary standard required at trial. The court ruled upon said motion by ordering that the following issues were set for trial:

> 1. What information, if any, did the City of Casselberry rely upon in making its legislative findings concerning the "secondary effects" recited in the ordinance?
>
> 2. If the City of Casselberry relied upon information in making its legislative findings, was the reliance reasonable?
>
> 3. Does the ordinance provide for "an adequate alternative means of communication?"

Morgan thereafter voluntarily dismissed her case without prejudice, leaving McKee and Club Juana as the plaintiffs. Following a lengthy trial, the trial court entered final judgment in favor of Casselberry. McKee and Club Juana appealed to the Fifth District Court of Appeal of the State of Florida. The Florida Fifth District Court affirmed. *McKee v. City of Casselberry,* 873 So. 2d 373 (Fla. 5th DCA

2004). McKee and Club Juana moved for rehearing, but their motion was denied. (Pet. App. 28)[1] McKee and Club Juana did not seek discretionary review in the Florida Supreme Court and opted, instead, to seek review in this Court.[2]

STATEMENT OF THE FACTS

A. Ordinance No. 98-922

Despite Club Juana's suggestions to the contrary, Ordinance No. 98-922 is not a public nudity ordinance; rather, it is an ordinance which regulates nudity in establishments that are licensed to sell or allow the consumption of alcoholic beverages. (Pet. App. 46) Simply stated, Ordinance No. 98-922 prohibits the combination of alcohol and nudity in said licensed establishments.

Ordinance No. 98-922 provides in relevant part:

> ***Prohibition.*** It shall be unlawful within the City of Casselberry for any manager, officer, agent, servant, employee, contractor, person in charge, customer, or invitee of any premises or bottle club licensed under the laws of the State of Florida to sell or allow the consumption of alcoholic beverages to knowingly, intentionally, or recklessly exhibit, suffer, allow, permit, engage in, participate in, or be connected with nudity

[1] The Appendix to the Petition for Writ of Certiorari will be referred to herein as "Pet. App." followed by the corresponding page number.

[2] McKee and Club Juana will hereafter be referred to collectively as "Club Juana."

> upon the licensed premises. The combination of nudity and alcoholic beverages at any premises or bottle club licensed under the laws of the State of Florida to allow the sale or consumption of alcoholic beverages within the City of Casselberry is hereby strictly prohibited.

(Pet. App. 46)

The preamble to Ordinance No. 98-922 states that the City Commission "finds and declares that nudity, coupled with alcohol in public places, encourages undesirable behavior and is not in the best interests of the public health, safety, and welfare of the citizens of the City of Casselberry" and further states that the City of Casselberry "has chosen to avoid the disturbances associated with mixing alcohol and nudity by means of a reasonable restriction upon any premises or bottle club licensed under the laws of Florida to sell or allow the consumption of alcoholic beverages on the licensed premises." (Pet. App. 40) The preamble to Ordinance No. 98-922 also states that it is supported by federal and state case law, and specifically lists examples of that case law. (Pet. App. 42)

B. Misstatements of Fact Contained Within Club Juana's Petition for Writ of Certiorari

In its Petition, Club Juana asserts that the trial court found that "the [C]ity failed to present credible evidence supporting its ordinance," that the court discounted the City's secondary effects evidence, that the trial judge "emphatically rejected" the testimony of the City's expert witness, William Henry George, Ph.D, and that the trial court "rejected" the City's evidence in this case. (Pet. for Writ of Cert., pp. 4, 5, 6) Those assertions are simply false.

In its order, the trial court stated:

> The city presented numerous documents as exhibits to prove adverse secondary effects occur as a result of serving nudity with alcohol. These documents include records of service calls made by the police to various locations, crime rate statistics and other information. **Taken together, the testimony presented and the evidentiary exhibits submitted suggest, but do not prove, that adult clubs cause adverse secondary effects.**

(Pet. App. 10) (emphasis added) The trial court did not say, or even suggest, in this provision or any other part of its order that the City's evidence was not credible, that the City's evidence was discounted, or that the City's evidence was rejected.

Additionally, although the trial court apparently believed the studies conducted by Dr. George on the effects of sexual arousal and sexual risk-taking, some of which have been funded by a $1.8 million grant from the federal government, did not reveal anything that is not already generally known, nowhere within the trial court's order did the trial court state that Dr. George's testimony was rejected. (Pet. App. 11-13) If anything, the trial court's commentary suggested that the trial court is of the opinion that Dr. George's studies were unnecessary because the conclusions he reached are already matters of common knowledge.

Furthermore, the trial court stated that the testimony of Casselberry City Manager Jack Schluckebier "saved the day for Casselberry," and that it "is convincing and it is accepted." (Pet. App. 14, 16) The trial court even quoted in its order several paragraphs from the transcript of

Schluckebier's testimony. (Pet. App. 14-16) The trial court's order indicates that Schluckebier's testimony was not "rejected" in any way whatsoever.

In short, nowhere within its order did the trial court indicate that "the [C]ity failed to present credible evidence supporting its ordinance," that it discounted the City's secondary effects evidence, that the testimony of Dr. George was rejected, or that any of the City's evidence was rejected. Accordingly, Club Juana's assertions that such findings and conclusions were made by the trial court are misstatements of the facts of this case.

Club Juana also contends that the City relied upon evidence that adult entertainment clubs cause a decrease in property values as evidence of adverse secondary effects in adopting Ordinance No. 98-922. That statement is also false. Although there was some discussion regarding this issue during atleast one of the City Commission meetings held prior to the adoption of Ordinance No. 98-922, no evidence was presented to the City Commission regarding a decrease in property values as a secondary effect of adult entertainment clubs that was relied upon by the City Commission as a basis for adopting Ordinance No. 98-922.

C. Evidence Presented By the City In Support of Ordinance No. 98-922

In its Petition, Club Juana states that the City's evidence in support of Ordinance No. 98-922 is "scanty," and that it's "pre-enactment 'evidence' comes down to handful of charts." (Pet. for Writ of Cert. 15) That assertion is far from the truth, to say the least.

The record in this matter establishes that the City relied upon a multitude of evidence before adopting Ordinance No. 98-922. Specifically, the City engaged in an eight to ten month process of workshops and hearings before adopting Ordinance No. 98-922. The evidence presented to and considered by the City Commission during that extensive process included, but was not limited to the following: information regarding arrests and illegal activity including drug trafficking, drug consumption, prostitution, illicit sex, robberies, and arrests at Club Juana and Rachel's (which is another adult entertainment club located in Casselberry); affidavits from former employees of Rachel's who were arrested during an undercover sting operation, indicating illicit activity such as prostitution and drug sales occurs at the clubs; the report of Casselberry Police Department Lieutenant Joe Mulson regarding the arrests of seventeen persons at Rachel's as a result of the undercover sting operation; testimony of other individuals regarding the adverse secondary effects created by the mix of alcohol and nudity; case law and studies from foreign jurisdictions regarding the secondary effects of the combination of alcohol and nudity; the results of the non-binding referendum held in Casselberry, in which the citizens of Casselberry indicated they approved of the City Commission enacting Ordinance No. 98-922; and a series of charts and testimony which depicted the community standards of Seminole County and cities surrounding Casselberry, and the fact that Casselberry's standards were lower than the standards of all surrounding communities.

At trial, the City presented ample evidence supporting its adoption of Ordinance No. 98-922. Specifically, City Manager Schluckebier testified regarding the history of

the City's regulations on adult entertainment; the City's purpose and intent in adopting regulations on adult entertainment; the City's desire to combat the adverse secondary effects occurring in the City as a result of the adult entertainment establishments located within the City; and the extensive evidence (which is outlined above) that was presented to the City Commission over several months before the adoption of Ordinance No. 98-922.

Dr. William Henry George also testified on behalf of the City at trial. Dr. George is a clinical psychologist and associate professor in the psychology department at the University of Washington. He also is Principle Investigator for Research on Alcohol's Effects on Sexual Arousal. He has conducted research experiments on alcohol and sexual arousal for over 20 years, and has been granted a $1.8 million federal grant to study over a five year period the effects of drinking on sexual arousal and sexual risk taking. Through his research, Dr. George has demonstrated that alcohol in combination with eroticized nudity does indeed cause adverse secondary effects.

Furthermore, at trial the City presented a plethora of evidence, including hours of undercover video tapes, documenting the illegal activity which in fact occurred at Rachel's. Indeed, Club Juana did not even attempt to refute the evidence of known illegal activity that occurred at Rachel's.

In short, Club Juana's claim that the City's evidence in support of Ordinance No. 98-922 was "scanty" is belied by the record in this matter.

D. Important Evidence Presented By Club Juana That Club Juana Failed to Mention in Its Petition for Writ of Certiorari

In its Petition for Writ of Certiorari, Club Juana places heavy emphasis on the testimony of Judith Hanna and the fact that the trial court accepted her testimony as true. It must be noted that within all of Hanna's testimony, she stated that a dancer's message can still be communicated and the dance still has serious artistic value in the absence of alcohol. She also testified that the receiver of the dance message does not have to consume alcohol in order to receive the message; "alcohol is irrelevant to [the] message. It's not part of the dance." Further, Hanna testified that you do not have to be in a bar to convey the message of erotic dancing.

Additionally, Club Juana failed to mention the testimony of Michael Pinter and Petitioner McKee. Pinter testified that ninety-five to ninety-nine percent of Club Juana's business is attributed to alcohol sales. He stated that Club Juana dancers who are over twenty-one years of age can drink alcohol and socialize with the patrons, so that there is a party atmosphere. Pinter also testified that there have been occasions when Club Juana dancers and waitresses had to be sent home because they were intoxicated.

Petitioner McKee testified that Club Juana dancers are permitted to drink alcohol at Club Juana while working. She stated that it is not necessary to drink alcohol in order to convey an erotic message. McKee also testified that she played a part in *Femmes Fatale*, and that it is not necessary for the audience who sees *Femmes Fatale* to drink alcohol in order to understand *Femmes Fatale*.

Furthermore, Club Juana failed to mention that its expert, Terry Danner, testified that of the studies he has

done, none of them were designed with the purpose or target of determining whether the combination of alcohol and nudity causes undesirable effects. Furthermore, his studies, which purportedly showed an increase in crime after the adoption of Ordinance No. 98-922, focused on index crimes, such as rape. Index crimes are not the types of crimes that Ordinance No. 98-922 was intended to reduce.

Club Juana also did not mention that Danner testified that the consumption of alcohol can cause people to become disinhibited, thereby increasing their potential to commit crime, and that establishments that allow an "anything goes" party atmosphere can be conducive to crime. In addition, Danner stated that places that serve alcohol as an important part of their business can facilitate crime. Further, Danner testified that a sexually-charged and alcohol prevalent environment can increase sexual assaults.

Danner stated that: an establishment offering live, nude dancing generally creates a sexually-charged atmosphere; an establishment that encourages a party atmosphere may also encourage sexual aggression; and, a party atmosphere can facilitate the occurrence of illegal drug use and sales.

ARGUMENTS FOR DENYING THE PETITION

I. Club Juana has failed to articulate any specific challenges to the decision rendered by the Florida Fifth District Court of Appeal, and therefore, has not presented any issues which this court has jurisdiction to review.

Club Juana seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257, which vests this Court with certiorari jurisdiction to review certain "[f]inal judgments

or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). The District Court of Appeal for the Fifth District of Florida is an intermediate appellate court, but is considered to be the "highest court" of Florida for the jurisdictional purposes of 28 U.S.C. § 1257(a). Accordingly, the "final judgment or decree" that is before this Court for review is the opinion on this matter that was rendered by the Florida Fifth District Court of Appeal, which is reported at *McKee v. City of Casselberry,* 873 So. 2d 373 (Fla. 5th DCA 2004).

In its Petition for Writ of Certiorari, Club Juana suggests that it is seeking review of the Fifth District Court's decision in this matter. A cursory review of Club Juana's argument, however, reveals that Club Juana has not set forth one single challenge to the Fifth District Court's decision in this case. Instead, Club Juana is asking this Court to review the bases for the trial court's ruling upholding Casselberry's Alcohol-Public Nudity Ordinance. Indeed, Club Juana summarized Point One of its case as follows:

> Rather than rehashing the evidence presented below, this case can be summed up by the fact that the trial court rejected Casselberry's evidence. Instead, the court upheld the ordinance on a misplaced legal theory – that Casselberry could prohibit nude dancing because other municipalities had ordinances prohibiting same. This justification completely undermines and ignores *Alameda Books* and *Pap's*.
>
> Because of this distortion, and because this case gives the Court a clear opportunity to highlight the import of the *Alameda Books'* standard (based upon a trial on the merits), this Court should accept review over this case.

(Pet. for Writ of Cert., pp. 15-16) Likewise, with regard to Point Two, Club Juana summarized its argument as follows: "The trial judge got the facts right but got the law wrong. For whatever reason he misunderstood the nature of the fourth prong of *O'Brien*."

It is important to note that the Fifth District Court conducted de novo review of the trial court's decision upholding Ordinance No. 98-922. *See North Florida Women's Health and Counseling Serv., Inc. v. Florida*, 866 So. 2d 612 (Fla. 2003) (trial court's ruling concerning the constitutionality of a statute or ordinance is subject to de novo review). Since the Fifth District Court did not issue a written opinion, but rather merely issued a citation decision, there is no way to determine the basis for the Fifth District Court's decision. (*See* Pet. App. A; *McKee v. Casselberry*, 873 So. 2d 373 (Fla. 5th DCA 2004)) For all we know, the Fifth District Court completely rejected the trial court's conclusions and decided to uphold the constitutionality of Ordinance No. 98-922 for entirely different reasons.

In any event, the Petition for Writ of Certiorari should be denied because Club Juana failed to articulate therein why this Court should exercise its discretionary jurisdiction to review the Fifth District Court's decision.

II. Ordinances similar to Ordinance No. 98-922 have repeatedly been declared constitutional by this Honorable Court and state and federal courts around the country, and therefore, this case does not present an important question that has not been, but should be, settled by this Court.

As indicated above, the question presented in this case is whether Casselberry's Ordinance No. 98-922, which

regulates nudity in establishments that are licensed to sell or allow the consumption of alcoholic beverages, is constitutional. Ordinances similar to the one at issue herein have been declared constitutional by this Court and federal and state courts around the country. *See, e.g., City of Newport, Ky. v. Iacobucci*, 479 U.S. 92 (1986); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); *California v. LaRue*, 409 U.S. 109 (1972); *Ben's Bar v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003); *BZAPS, Inc. v. City of Mankato*, 268 F.3d 603 (8th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002); *Wise Enterprises, Inc. v. Unified Gov't of Athens-Clarke County, Ga.*, 217 F.3d 1360 (11th Cir. 2000); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998), *cert. denied*, 529 U.S. 1052 (2000); *Geaneas v. Willets*, 911 F.2d 579 (11th Cir. 1990), *cert. denied*, 499 U.S. 955 (1991); *Lanier v. City of Newton, Ala.*, 842 F.2d 253 (11th Cir. 1988); *Fillingim v. Boone*, 835 F.2d 1389 (11th Cir. 1988); *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir. 1982), *cert. denied*, 459 U.S. 859 (1982); *City of Daytona Beach v. Del Percio*, 476 So. 2d 197 (Fla. 1985); *Carchio v. City of Ft. Lauderdale*, 755 So. 2d 668 (Fla. 4th DCA 1999), *rev. denied*, 753 So. 2d 563 (Fla. 2000); *City of Bangor v. Diva's, Inc.*, 830 A.2d 898 (Me. 2003); *Township of Van Buren v. Garter Belt, Inc.*, 673 N.W.2d 111 (Mich. Ct. App. 2003), *appeal denied*, 682 N.W.2d 86 (Mich. 2004); *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228 (R.I. 2000).

As the case law cited above reveals, the issue presented by this case is well-settled. Municipalities may indeed constitutionally regulate nudity in establishments that are licensed to sell or allow the consumption of alcoholic beverages. Since there is no unsettled, important

question presented by this case, this Court should deny Club Juana's Petition for Writ of Certiorari.

III. The Florida Fifth District Court of Appeal did not issue a published opinion in this case, and therefore, its decision does not create a conflict with any decision of a state court of last resort or federal court. Accordingly, this case does not merit this Court's review.

The Florida Fifth District Court's decision upholding the constitutionality of Ordinance No. 98-922 is simply a citation decision; in other words, the decision merely cites one case as the basis for the court's ruling and does not discuss whatsoever the rationale for the court's ruling. (Pet. App. 1; *McKee v. City of Casselberry,* 873 So. 2d 373 (Fla. 5th DCA 2004)) Since there is no discussion contained within the court's decision, the decision does not on its face create a conflict with any other court decision.

Furthermore, as set forth above, many courts around the country have upheld the constitutionality of ordinances similar to Ordinance No. 98-922. The Fifth District Court's decision in this matter does not conflict with those decisions, but rather lends further support for the premise that municipalities may lawfully regulate nudity in establishments that are licensed to sell or allow the consumption of alcoholic beverages. Accordingly, this case does not present a conflict in the law which requires this Court's resolution, and thus, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the City of Casselberry respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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